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THE RECENT HIGH COURT RULES RELATING TO SECOND APPEALS.

The rules recently made on the above subject will come into force from the 15th August. There are several among us who will have to be taught the gist of these rules by the Appeal Examiner and his assistants over the signature of the Deputy Registrar on the Appellate Side. The aim of this article is not only to save practitioners on the Appellate Side, from this humiliating position, but also to enable professional gentlemen in the moffusil to give effective advice to their clients as to how to carry a matter up in Second appeal.

Practitioners in the muffusil Civil Appellate Courts will have to remember that rule 49 of the Civil Rules of Practice 1905, has been amended and added to in various particulars. On and after the 15th of August 1915, the said rule would read thus:—

Printing judgments, etc.

49. (1) When a copy of judgment or order passed by a Civil Court is applied for by a party to the suit or proceeding for the purpose of appealing against it to the District or Subordinate Judge's Court, the copy shall be printed, *provided* the length of the judgment or order (excluding the names of parties, and witnesses and the list of exhibits) exceeds 700 words. In cases where the length of the judgment or order does not exceed 700 words, the production of a printed copy is not compulsory.

When the plaintiff and defendant apply separately for copies of the same judgment, each must pay the full printing charges and each application will be dealt with by itself irrespective of the other.

(2) The general procedure in applying for such copy, and in disposing of the application shall be that laid down in the above rules relating to certified copies. The Superintendent, examiner or other officer shall calculate the charges required for printing the judgment or order, reckoning at the rate of 4 annas for every 175 words completed, and for the remaining words, 1 anna for every 50 words or fraction thereof. Four figures, or four simple letters used as abbreviations, shall be taken to be equivalent to one

word. The names of parties and witnesses and the list of exhibits shall also be printed and included in the charges according to the above rates. When tabular statements, genealogical trees and the like form an integral part of the judgment, they shall also be printed. A special rate for printing these shall be fixed by the Court concerned in each case, having regard to their length and complexity and the space they occupy.

(3) The applicant shall thereupon be informed, by notice of the amount payable by him for printing charges and for postage in cases where it is leviable under clause (7) *infra* in the same manner as he is now informed of the number of stamp papers required for a manuscript copy, and at the same time he shall be directed to pay that amount in cash by any means he may choose, direct to the authorized printer whose name and address shall be stated, within seven days of the date of the notice in default of which his application for copy will be struck off.

(4) The printer shall (ordinarily) supply four printed copies to the Court. On receipt of the four printed copies, they shall be authenticated and two copies shall be delivered to the applicant, one bearing an endorsement of dates, such as are endorsed upon manuscript copies, save that the word "*charges*" shall be substituted for the words "stamp papers" to be filed with the appeal and used at the hearing, and the second to be kept by the appellant for his own use. In computing limitation, the Court may allow, out of the seven days allowed for the payment of printing charges, as many days as it deems fit in each case as time requisite for obtaining a copy, if the printing office is five or more miles distant from the Court calling for the charges. The two remaining copies shall be placed with the records of the case, one to be given *gratis* to the respondent, and one spare copy for supply, also *gratis*, to a second or more respondents having separate interests in the subject-matter of the appeal, or for any other exceptional use. The costs of printing and of postage when it has been incurred under clause (7) *infra* shall be made costs in the appeal, and the appellate Court shall declare by an express order, whether they are to be borne wholly by the appellant, or by the respondent or respondents, or proportionately, and in what proportion by each party

If an appellant requires more than two copies allowed him by this rule, such extra copies shall be supplied to him on payment of charges calculated at a rate not exceeding one anna per page.

(5). When a copy of the judgment or order passed by an appellate Court is applied for by a party to the suit or proceeding or appeal for the purpose of appealing against it to the High Court, such copies shall likewise be printed.

On receipt of such application, the Superintendent, examiner, or other officer may, unless the applicant otherwise requests, call also for the judgment or order of the Court of First instance against which, judgment or order was passed in appeal, and shall collect the necessary charges for printing both. In such case the printer shall ordinarily supply eight printed copies, six of which shall be delivered to the applicant.

Out of the six copies delivered to him, he shall be charged for two of such copies at the rate mentioned in clause (2) above, and for the others he shall be charged at a rate not exceeding one anna per page.

If the applicant applies for more copies, or if any other party to the suit, appeal, proceeding or connected suit (in cases where there is one judgment or order for several connected suits) applies for copies before the order is issued for printing or within a week of the application, whichever is longer, such copies shall be supplied on payment of charges calculated at a rate not exceeding one anna per page.

If any application is made after such date, the full printing charges must be paid and such application will be dealt with irrespective of any other.

(6). In order to show cause, when required, why an appeal from an original order, or from an appellate decree or order should not be dismissed without notice under Order XLI, rule 11, (read where necessary with order XLII or Order XLIII rule 2) of the First Schedule to the Code of Civil Procedure 1908, a party may apply to the District or Subordinate Judge's Court to print a decree or any other paper or if it be not in the English language may present for printing a translation in English of the same, certified by his pleader to be a true translation; such applications shall be dealt with in the same manner as applications for the printing of appellate judgments, provided that printed copies can be delivered to the applicant with copies of the judgments for which he may have applied under the above rules.

(7). If the Court is more than five miles from the printer, the party applying for the copy shall pay for the postage, which like the printing will be taxed as costs in the case. A uniform rate of one anna for every 700 words shall be charged to the applicant for postage in addition to the charges for printing, and it shall be included in the notice given to him under clause (3) *supra* for payment direct to the printer.

A proviso has been added to Order XLII, rule 1, in the First Schedule to the Code of Civil Procedure, which would read thus:—

ORDER XLII.

Appeals from Appellate Decrees.

The rules of Order XLI, shall apply, so far as may be to appeals from appellate decrees.

Provided that in appeals from appellate decrees, the Memorandum of Appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy, and also four printed copies of the judgment of the Court of First instance, one of them being a certified copy

The result is, every appellate judgment however short it may be in length, has to be printed if the matter is to be taken up to the High Court in second appeal, and the limitation provided in rule 49 (1) of the Civil Rules of Practice as to lengthy judgments alone being required to be printed for purposes of appeal would not apply to copies of original, as well as of appellate judgments, a printed certified copy of each of which it is imperative to file with the memorandum of every second appeal. When the original judgment exceeds in length 700 words and has to be printed for purposes of appeal, practitioners will do well to keep in mind the possible contingency of a second appeal and taking advantage of the second paragraph of sub rule (4) of rule 49 C. R. P. keep their clients fully supplied with the requisite number of printed copies of the original judgment required by the newly added proviso to Order XLII, rule 1; but when the length of the original judgment does not exceed 700 words, as well as in all cases where the appellate Court reverses or modifies the decree and in cases where it confirms the decree and the appellant has not taken the precaution above referred to, the original judgment will have to be printed as also the appellate judgment in the event of its being decided to prefer a second appeal. The newly added sub. rule (5) of rule 49 C. R. P. throws the burden of arranging to get the requisite number of copies printed upon the Superintendent, examiner or other officer connected with the copyist establishment of the moffusil civil appellate Court. Provision is also made for the necessary printing (1) when more persons than one desire to prefer independent second appeal from the same appellate decree, and (2) to meet cases of batches of appeals covered by a single leading judgment.

It is however strange that those responsible for promulgating the new rules have in their wisdom seen fit to bring into operation the addition to Order XLII, rule 1, of the First Schedule to the Code of Civil Procedure on the same date as the amendment of rule 49 of the C. R. P.; but the oversight seems to be almost providential, because we learn more by committing mistakes and subsequently realising that we have gone wrong than by doing the right thing at the right time in the right manner by a sort of blind instinct. A period of at least six months must elapse, having regard to the delay necessarily incidental to getting papers printed through the Court establishment in a moffusil station

and to the provisions of article 156 of the First Schedule to the Limitation Act, between the very first application under rule 49 (5) of the Civil Rules of Practice and the first act of compliance with the proviso to Order XLII, rule 1 C. C. P. However, the notification as it appears at p. 1271 in Part II, of the Fort St. George Gazette of July 6th 1915 admirably serves to bring out the very intimate connection between the moffusil printing establishment and the procedure prescribed for filing second appeals under the new rules. This close connection is further emphasised by rule 49 (6) of the C. R. P., which provides for the printing (from the originals or from translations certified by the pleader to be a true translation) of any portion of the record required by a party who apprehends that his appeal or second appeal might be posted under Order XLI, rule 11, (read where necessary with Order XLII or Order XLIII rule 2 as the case may be) in order to show cause why it should not be dismissed without notice being served on the respondent. But this proviso is purely enabling. If the party has not taken steps to get the necessary papers printed under rule 49 (6) of the C. R. P., rule 42 of the rules of the High Court Appellate Side as recently amended provides for typed copies of selected portions of the evidence being put into Court along with the memorandum of Second Appeal. The privilege however of putting in a translation of a record which is not in English is not, for obvious reasons, extended to parties appealing in person. Rules 42 and 43 of the Appellate Side rules as recently amended, would read thus :—

42. (1) When presenting the memorandum of the grounds of appeal from an appellate decree, or order, the appellant or his pleader shall also present (1) printed or typed copies of the decree or order of the Court of First Instance and (2) printed or typed copies of all papers on which he intends to rely, should the appeal be posted for hearing under Order XLI, rule 11, read where necessary with Order XXII or order XLII, XLIII rule 2, of the First Schedule to the Code of Civil Procedure, 1908.

Provided that where any paper on which the appellant intends to rely is not in the English Language and the appellant appears by pleader, printed or typed copies of English translations thereof, certified by the pleader to be correct translations, may be presented in lieu of copies of such original paper.

(2) The provisions in Clause (1) *supra* shall apply as far as may be necessary to appeals from an original order.

43. The Registrar may post any appeal from an appellate decree or order before a Bench of two Judges for hearing under Order XLI, rule 11, read where necessary with Order XLII, or Order XLIII, rule 2 of the First Schedule to the Code of Civil Procedure, 1908. Notice of the date of such hearing shall be given by posting a list of appeals to be so heard on the notice-board of the Court three clear days before the date of hearing.

To sum up:

The connection of a moffusil professional gentleman with a civil suit does not cease with the decision of the Court in which he practises. A pleader ordinarily practising in a Munsiff's Court, with a little foresight and a trifling expense to the party could save considerable time and cost, if he would apply for a sufficient number of extra copies under the second pragraph of rule 49 (4) of the C. R. P.

There is no reason why this provision should be confined to an appellant from the original decree. Why should not the successful party in the Court of first instance be allowed to take advantage of it, should he be driven to prefer a second appeal by reason of an adverse decision in the appellate Court, especially when a similar provision is made in rule 49 (5) C.R.P. as regards the successful party in the appellate Court obtaining printed copies under that sub rule ?

A pleader in an appellate Court, if he is unsuccessful can no longer satisfy his conscience in the old fashioned way, by merely telling his client to go to Madras where he will readily get justice. While the facts and the merits of the case are still fresh in his mind, he will have to decide in the light of the appellate judgment, whether he could in all conscience advise a second appeal being filed or at all events advise the party who has lost in the appellate Court to incur additional expense with a view to preferring a second appeal. If a second appeal is to be preferred, an application for a printed copy of at least the appellate judgment should be lodged immediately, and no one is better qualified to advise the party as to the chances of success in a second appeal than the pleader who has studied the case in the appellate Court and heard his opponent and listended to the pronouncement of the appellate tribunal on the entire merits of the case. There can be no doubt that practitioners in the moffusil appellate Courts are pre-eminently qualified to discharge these functions calmly, especially after they have had

sufficient time to cool from the ardour and zeal incidental to forensic advocacy. If this duty is conscientiously discharged, parties who have lost in the appellate Courts will no longer be allowed to shift for themselves and incur the heavy burden and expense necessarily incidental to the maintaining of a second appeal more often from a spirit of pure gambling than from the fact they had received competent legal advice that they have reasonable chances of success in the High Court. As regards the new sub rule (6) of rule 49 C. R. P. if any document had been misconstrued or improper legal inferences drawn therefrom a practitioner who has argued in the appellate court is undoubtedly best qualified to supply the High Court with a list of such documents together with true translations, where necessary. There can be no doubt that he will discharge this duty faithfully, more especially if he knows that his selections and translations will be tested in the light of those put forward on behalf of the opposite party when the second appeal is heard under order XLI, rule 16, read with order XLII or Order XLIII rule 2 as the case may be.

It may be also suggested that in important cases as soon as the appellate judgment is delivered, two applications for copies may be made, one for a manuscript or typed copy of the appellate judgment alone for the purpose of seeking legal advice as to the desirability of preferring a second appeal, the other for a copy of the appellate decree and the requisite number of printed copies of the judgments. If care is taken to omit from the first application the copy of the appellate decree, time will not count and Counsel's opinion can be easily obtained on the manuscript copy of the appellate judgment long before the copies for the purposes of the second appeal are ready.

After the 15th of August, or such extended time as the High Court might find it necessary hereafter to fix, practitioners in the High Court will bear in mind the proviso to Order XLII rule 1 under which the enclosures that ought to accompany a memorandum of second appeal are

(*a*) One copy of the appellate decree

(*b*) four printed copies of the appellate judgment (one certified)

(c) four printed copies of the original judgment (one certified)

(d) one printed or typed copy of the original decree

(e) printed or typed copies of such portions of the evidence (including translations certified by the pleader) sought to be relied on should the second appeal be heard under Order XLI, rule 11, read with Order XLIII

(f) An ordinary T. & P. application as under the existing practice.

It is needless to add that out of the four copies of the original or appellate judgment, the certified copies alone require to be stamped under Art. 6, of the First Schedule to *the Court Fees Act.*

The members of the profession will also do well to note what appears at first sight to be sheer waste of energy and resource, if papers already printed under rule 49 C. R. P. are to be reprinted at any stage of a second appeal. If the profession, on behalf of the litigant public, would stir in the matter, it ought not to be impossible to provide that what is printed under rule 49, is sufficient to serve all concerned at all the stages of a second appeal and the introduction of some provision of Law with this object in view would save the litigant considerable time and expense.

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SUMMARY OF ENGLISH CASES.

Stickney v. Keeble: (1915) A. C. 386.

Contract for sale of land—Time not of the essence of contract, meaning of the rule—Long delay—Right to party to fix time—Judicature Act—Effect of.

This case contains an explanation of the equity rule that time is not of the essence of the contract in the case of agreements for the sale and purchase of real estate.

Whereas Courts of law always held the parties to their bargain in this respect with the result that if the vendor was unable to make a title by the day fixed for completion, the purchaser could treat the contract as at an end and recover the deposit, equity having a concurrent jurisdiction, whenever it could do so without injustice to the contracting parties, decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This was all the meaning of that maxim, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties when for instance the parties had stipulated that the time fixed should be essential, or there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

It was only for the purposes of granting specific performance that equity in this class of cases interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract or had by his conduct lost the right to specific performance had no equity to restrain proceedings at law based on the non-observance of the stipuulation as to time.

Accordingly, to an action for return of deposit, the vendor would have no defence if after the suit he sells away property to third party, as there could be under the circumstances no question of specific performance.

The Judicature Act has made no difference in the matter. Even now, if the court is asked to disregard a stipulation as to time in an action for common law relief and it be established that equity would not under the then existing circumstances have prior

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to the Act granted specific performance or restrained the action that section can have no application.

One application of the rule that equity will not interfere when there is injustice is that although the vendor's conduct may not under the circumstances be alone sufficient to disentitle him to specific performance, yet if he has been guilty of unnecessary delay and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract as at an end equity will not after the expiration of such time, provided it is a reasonable time, enforce specific performance or restrain an action at law.

In considering whether the time given was reasonable or not, this fact has to be taken into consideration, that the defendant had to purchase the property which could only be done after carrying out certain other sub-purchases and that all this required time was unnecessary unless it could be shown that the plaintiff had consented to the agreement being carried out in that manner.

Jureidini *v.* **National British and Irish Millers Insurance Company, Limited,** (1915) A. C. 499.

Arbitration clause—Fire insurance policy—Effect of repudiation of liability under.

One of the clauses in a fire insurance policy was that if the claim was fraudulent or the loss was caused by wilful default, all benefits under the policy should be forfeited. Another clause was that any difference as to loss was to be first referred to arbitration. In this case the Company repudiated the claim on the ground of fraud.

Held, that the Company having altogether repudiated its liability, could not plead the arbitration clause as a bar to an action on the policy.

Glasgow and South-Western Railway Company *v.* **Boyd and Forrest,** (1915) A. C. 526.

Contract—Rescission on the ground of mistake—Performance with knowledge of facts entitling—Effect of.

A claim for rescission of contract by the contractors on the ground of essential mistake is unsustainable when with notice of facts the contractors have chosen to execute the work

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Trustees of the Harbour of Dundee *v.* **D. and J. Nicol:** (1915) A. C. 550. (Scotch Case).

Corporation—Powers— Ultra vires*—Title to sue—Legal relation—Instances of—Right of rate-payers of harbour trust to prevent* ultra vires *act of trustees.*

The law as it stands is that a statutory corporation has no power which it has not been either expressly or impliedly been given by the statute creating it. The question is simply one of construction and not of presumption. *Held, accordingly*, that a statutory body of harbour trustees who were given a franchise of ferry within certain limits could not let out the boats for excursion trips beyond the ferry limits when the boats were not required for the ferry traffic.

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Discussing the question as to whether the plaintiffs in the case, a firm of shipowners who let out steamers for excursion trips and paid rates to the trustees for the use of the harbour, Lord Dunedin said that the English law in this matter bristles with difficulties having their origin in the rigid rules of common law actions with subsequent modifications by equity and statute law and was not of assistance in determining the Scotch Law on the subject. According to that law for a person to have a title to sue, he must be a party (using the word in the widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies. As instances of that legal relation, the learned Law Lord gives ownership, contract and fiduciary relationship. The plaintiffs in this case in the capacity of harbour ratepayers being also members of the constituencies erected by the Act of Parliament to elect the trustees and as such also persons for whose benefit the harbour is kept up, his Lordship held that they had a right to prevent an *ultra vires* Act of the defendants. In coming to a conclusion in favour of the plaintiffs, their Lordships were influenced to a large extent by the fact that under the Scotch Law there was no procedure of actions by relation of the Attorney-General as obtains in England.

Attorney-General of Southern Nigeria *v.* **John Holt and Company:** (1915) A. C. 599. (P. C.)

Easement—Categories capable of Explanation—Storage right—Enjoyment as owner—Not sufficient to claim—Easement—

Accretion—Application—Foreshore rights—Abandonment of—Irrevocable license—Doctrine of—Artificial reclamation—prevents.

The category of servitudes and easements must alter and expand with the changes that take place with the circumstances of mankind applying this dictum of Lord St. Leonard's in *Dyce* v. *Hay* [1], their Lordships held that there could be an easement to store goods. Their Lordships held however that when the right was all along exercised only in assertion of the right of ownership, such enjoyment could not be the source of acquisition of an easement right; the defendants having reclaimed the foreshore and made costly erections and enjoyed for a long time storage and other valuable rights, in the circumstances of the case, their Lordships held that a license to do the acts should be presumed which had become irrevocable by the construction of costly works on the basis of such license.

Considering the doctrine of accretion which came for discussion in the case, their Lordships point out that while its application is not excluded by the fact that the grant of the land abutting the foreshore is by measurement, it required that the growth must be slow, natural and imperceptible in its progress and could not comprehend cases of silting up by artificial reclamation.

The abandonment of rights annexed to land is a question of intention and their Lordships were unable to infer an intention to abandon the special foreshore rights vested in the *frontagers* by the mere fact that he had reclaimed a portion of the foreshore when they were using the reclaimed land for purposes of storing their goods and affording facilities of transport, etc., to the sea.

Balmukund v. King-Emperor: (1915) A. C. 629.

Privy Council—Not a Court of Criminal appeal—No power to suspend execution of sentence.

The Privy Council is not a Court of Criminal Appeal and could not stay execution pending the hearing of the petition for special leave. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the executive Government and is outside their Lordship's province.

1. (1852) 1 Macq. 305.

The King v. Robinson (1915) 2 K. B. 342 C. A.

Offence—Attempt to Commit—Preparation for—Distinction—attempt to obtain money by false pretences—Direct communication to person intended to be defrauded or to his agent, if necessary.

There must be some act beyond mere preparation if a person is to be charged with an attempt. A person cannot be convicted of attempting to obtain money by false pretences where there is no evidence of the false pretence having been made to the person intended to be defrauded or to his representative. It is not enough to show that the accused made the false pretence to a third person with the object that the latter will report it to the person intended to be defrauded.

Gunyon v. South-Eastern and Chatham Railway Companies' Managing Committee (1915) 2 K. B. 370.

Railway Company—Contract of Carriage—Construction—Consignment by Passenger train at "Owner's risk"—Carriage by Goods train—Delay—Loss—Liability of Railway Company.

Where a railway company has promised to perform the conveyance in a certain manner with an attendant right to take advantage of certain stipulations made in their favour, they cannot put upon the consignor a mode of conveyance which he has not contracted for and yet retain in their own favour the stipulations referrable to the agreed mode of conveyance only.

The plaintiff consigned fruit by passenger train from S. station on defendant's railway to Glasgow, at reduced rates and at owner's risk on the terms of a consignment note which relieved the defendants "from all liability for" amongst other things, "delay... except upon proof that such delay arose from wilful misconduct on the part of the defendant's servants. The carriage from S. station to London was duly performed by passenger train, but from London to Glasgow, it was performed by Goods train. As a result, the fruit arrived damaged, for which loss the plaintiff sought to recover damages from the defendants. *Held*, that the term providing for carriage by passenger train was of the essence of the contract that, when in London the fruit was shipped on a Goods train, the contract was no longer being performed, and the goods were no longer being carried at "owner's risk", that therefore the plaintiff was not under an obligation to prove that his

loss was caused by the wilful misconduct of the defendant's servants and that judgment should be entered for the plaintiff.

The King v. Hopper (1915) 2 K. B. 431 C. A.

Criminal trial—Trial with jury.—Duty of Judge to direct Jury on question arising out of evidence, although not relied upon by counsel for accused.

Whatever the line of defence adopted by counsel at the trial of a prisoner, it is for the Judge to put to the jury such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself.

Where at a trial for murder, counsel for the accused relied substantially on the defence that the killing was accidental, but indicated quite clearly before the Judge came to sum up that although he was raising the defence of accident, he was not giving up the defence of manslaughter, and that he intended to claim a verdict of manslaughter if he did not succeed in obtaining an acquittal on the point of accident, and there was some evidence to justify the jury to find a verdict of manslaughter; *held*, that the question as to the crime being manslaughter only ought to have been left to the jury, and that the Judge was wrong in directing them to find the prisoner guilty of murder, if they thought the killing was not accidental.

Clare and Co., v. Dresden Bank. (1915) 2 K. B. 576.

Banker and Customer—Relation of—Nature—Account at one branch—Demand for payment at another branch—Refusal to pay—Action by customer against Bank—Maintainability.

Locality is an essential part of the debt owing by a banker to his customer, and his obligation to pay is limited to the place where the account is kept.

A customer having an account at one branch of a bank in one place is not entitled to demand of another branch of the same bank situated in another place, payment of the balance due on the account at the former branch and, upon refusal to pay, sue the bank without having made any request to the former branch to pay or to remit the balance to the latter branch.

Difference between the relation of debtor and creditor and that of banker and customer pointed out.

JOTTINGS AND CUTTINGS.

The Bar in Alien enemy cases.—The Lord Chief Justice, at the sudden close of the Kuepferle spy trial, made some timely observations on the functions of the bar. 'It is in accordance with the honourable traditions of the bar,' he observed, 'that even a charge so odious as that of spying in the interests of the enemy should meet with a proper defence.' And he proceeded to remark that the counsel who had appeared for the defence had 'acted in the highest public interest in so doing.' This deserved to be said, not merely because members of the bar must now frequently be engaged in the defence of persons who are found to be the enemies of their country, but also because an attempt has recently been made to revive the mischievous fallacy that an advocate ought to be satisfied that his client is in the right before he undertakes to represent him in Court. That, happily, has never been the view on which English advocates have acted. 'If', said Erskine, in his famous defence of Thomas Paine, 'an advocate refuses to defend from what he may *think* of the charge, he assumes the character of the Judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy inference of, perhaps, mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English Law makes all presumptions'. A prisoner, no matter how odious the charge brought against him is, according to the English principle of Justice, deemed to be innocent until he is convicted, and members of the bar would show a complete disregard of this time-honoured principle, as well as the most honourable traditions of their calling, were they to refuse to defend an alleged spy, or, indeed, to represent any cause merely because it happened to be unpopular—*The English Law Journal June 5, 1915.*

* * *

The Functions of the Advocate :—Members of the bar are not the agents of their clients; they go into Court to assist it to ascertain the truth. As Sydney Smith put it, in a famous assize sermon he preached at York in 1824, ' Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practised and ingenious men presenting

to the selection of an impartial judge the best arguments for the establishment or explanation of truth.' The mischievous theory that an advocate ought, by some original investigation, to decide that his client is innocent before he defends him in Court, is derived from Jeremy Bentham, who went the length of regarding the advocate of a guilty prisoner as his 'confederate' and 'accomplice.' But Bentham was inclined to hate all lawyers, because they were reluctant to support his proposals for reforming the law, some of which were not of great practical value. He was apt to regard judges, barristers and solicitors as associates in a conspiracy to defeat the ends of justice, and, growing scurrilous as he proceeded from false premises, he vilified and defaced until he left.

Not even Lancelot brave, nor Galahad clean.

Dr. Johnson had a much better notion of the functions of the advocate. When Boswell asked him, 'what do you think of supporting a cause you know to be bad?' the Doctor replied, 'Sir, you do not know it to be good or bad till the Judge determines it. It is his business to judge, and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.' That is really the conclusion of the whole matter. The famous layman knew better than the distinguished jurist. The mischievousness of the Benthamite theory is that, were it adopted, an undefended prisoner would practically be condemned before he was tried. 'There is, 'as Lord Hannen once remarked in the Divorce Court, 'an honourable way of conducting the worst of cases'.—*Ibid.*

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Lawyers in the Ministry. Two more Lawyers have been added to the Ministry. Lord Robert Cecil, who has succeeded Mr. Neil Primrose as Under-Secretary for Foreign Affairs, and Mr. Hayes Fisher, who has taken the place of Mr. Herbert Lewis as Parliamentary Secretary to the Local Government Board, are both members of the Inner Temple. Both, too, have in their veins a rich flow of legal blood. Lord Robert's mother was the daughter of Baron Alderson, one of the judges whose names adorn the list of Senior Wranglers. He had, among mo

judicial gifts, the habit of dropping into poetry, and whilst a flourishing junior on the Northern circuit he wrote an 'Ode to Adversity,' which, after bidding that Sombre goddess not to intrude upon his haunts, concluded with the following cheerful stanza:—

But' stead of Thee let business come,
Attached by the ceaseless hum,
Of motions, briefs, appeals,
How sweet her voice, how fair her mien,
While in perspective dim are seen
King's counsel and the Seals.

Though it was never Baron Alderson's lot to see 'The Seals' except in 'perspective dim'; he established a great reputation as an able and impartial judge. He presided at the trial of the Chartist prisoners, who thanked him from the dock for the fairness which he had displayed towards them. Mr. Hayes Fisher, like Lord Robert Cecil, derives his legal instincts from the maternal side. He is a grandson of William Hayes, whose fame as a conveyancer has survived even the many drastic changes which have been made in conveyancing since he practised the art in Lincoln's Inn.—*The Law Journal, June 5, 1915.*

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"De Minimis."

Lord Haldane acted as Lord Chancellor for only three years. During that period, however, he was called on to exercise a large amount of patronage. We believe we are correct in stating that Lord Haldane appointed Lord Dunedin, Lord Moulton, Lord Parker and Lord Sumner to the House of Lords. Sir Walter Phillimore, Sir William Pickford, Sir John Elden Bankes and Sir Thomas Warrington all owe their appointments to him. His Lordship has also appointed a large number of High Court Judges *viz.*, Lord Reading, Mr. Justice Sargant, Mr Justice Astbury and Mr. Justice Younger, Mr. Justice Rowlatt, Mr. Justice Bailhache, Mr. Justice Atkin, Mr. Justice Shearman, Mr. Justice Sankey and Mr. Justice Low. With one exception public and professional opinion has approved of these appointments.

Lord Haldane, rumour says, will in future devote himself to the work of the Judicial Committee of the Privy Council. This is good news. His Lordship is credited with imperialistic views as to the Judicial Committee. No doubt he will do much useful work in reforming that body, but we trust that any alteration of

that august body will only be effected with the entire approval of all parts of the British Empire.

Sir Stanley Buckmaster has attained the Woolsack at an early age. Without in any way disparaging his high legal attainments, this success is due to a certain extent to "luck." His Lordship has not been too strong in his politics—not offensively strong. No doubt the claim of Sir Robert Finlay would have secured him the coveted post for which he has so long been marked, but Sir Robert is strongly Conservative. The national and political necessities of the moment called for a man not too strongly partisan. Personally, we thought Lord Parker would have been selected. The new Lord Chancellor will, no doubt, worthily uphold the great traditions of the office, but the reasons for his appointment afford another proof, if any is needed, of the curious system of government under which this country lives. The highest legal office in the kingdom should surely go to the nation's most learned and most esteemed lawyer, apart from his political views.

Sir John Simon has chosen a political career. No man has ever before refused the Lord Chancellorship for the post of Home Secretary. Sir John Simon evidently aspires to lead his party.

The fact that Sir Stanley Buckmaster presided over the deliberations of the House of Lords for some little time before he had obtained his peerage brings out what is sometimes forgotten, that there is no legal necessity that the Lord Chancellor should be a peer, and that even a commoner holding that office can act as Speaker of the House of Lords. True, he cannot address the House, for, unless the holder of a peerage, he is not a member, but he can adorn the Woolsack and preside from thence, for that article of furniture is not technically within the limits of the House.

Mr. Asquith, according to the *Globe*, is credited with thinking of an interesting experiment before he decided upon Sir Stanley Buckmaster's promotion to the Woolsack. He contemplated, it is said, choosing for the exalted office a Lord of Appeal-in-Ordinary, whose politics were quite unknown. Had Lord Parker been appointed he would have been the first Lord of Appeal to become Lord Chancellor. There would, however, have been nothing novel in choosing a Lord Chancellor from the ranks of

the Judges. Until comparatively recent times, indeed, it was the common practice. Of the sixteen Lords Chancellors who have held office since the beginning of the Victorian era, half reached the Woolsack with judicial experience gained in lower offices. Lord Lyndhurst and Lord Cottenham were Masters of the Rolls; Lord St. Leonards was Lord Chancellor of Ireland; Lord Truro and Lord Campbell were Chief Justices; and Lord Cranworth, Lord Cairns, and Lord Hatherly were Lords Justices. Not since 1856, when Lord Hatherley was appointed, has there been a promotion from the Bench to the Woolsack.

Many persons would have been delighted to have had Lord Parker as Lord High Chancellor.

The United States Judges must have plenty of time on their hands. The verbosity of their decisions distinctly proves that they are not "hustled." In *Graham* v. *State* [1], decided by Georgia Court of Appeals, we read the following judgment: "While the indictment described the cow as 'one blue and white speckled' cow, this description would include equally well a cow which was black and white speckled, since it is a matter of common knowledge that literally speaking, no cow on this mundane sphere is actually 'blue,' though cows of that color may possibly browse through the valleys of the moon, graze along the banks of the canals that seem the face of the planet Mars, or disport themselves in the realms of fairyland."—*Law Notes, July, 1915.*

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Bombardment and the Three-mile Rule.—One, at least, of the propositions of law which will need revision in the light of the experience of the present war is that which goes to so fundamental a question as the limits of the jurisdiction of the State and the bounds of its sovereignty. The rule that this extends only to three marine miles measured from low-water mark is now of universal acceptance, but it was not settled without opposition. The extravagant claims of fifteenth-century monarchs to whole oceans were combated by Grotius in his *Mare Liberum*; and what he achieved by his destruction of the groundwork of theory was completed in practice by the advance of commercial intercourse. The Behring Sea Arbitration of 1893 between Great Britain and the United States marks the last determined attempt of a Great

1. 84 S E. 981.

Power to assert some of the older pretensions to sovereignty over the open sea. In 1870 the famous case of *Regina* v. *Keyn* raised in an acute form the question whether, assuming the three-mile jurisdiction to exist in international law, it could be deemed incorporated into English law without an Act of Parliament, a majority of the Court holding that an Act of Parliament, would be necessary. The Territorial Waters Jurisdiction Act of 1878 conferred this jurisdiction on the Crown for the future, and declared that it had existed in the past. In spite of certain attempts to extend the State jurisdiction to six miles, notably that of the Institute of International Law (Annuaire, XIII., p. 281), the three-mile limit is on the whole generally adopted. The purpose of the jurisdiction is every where fundamentally the same—namely, self-preservation. And the test was laid down by Bynkershoek, writing in the 18th century, in the well-known maxim *terrae potestas initur ubi finitur armorum vis*. In other words, the firing-range of that period being three miles, the extent of control has remained at that point, irrespective of the developments of gunnery. The question then arises whether, in face of the new knowledge gained in the present war, a complete revision of this outworn principle will not be imperative. We know now, for example, that the *Blucher* was sunk by the British Fleet at a range of 17,000 yards; that some of the Dardanelles forts were bombarded at a range of 13 miles; while there has been free talk of some portentous German guns which, mounted on platforms, could sweep the Straits of Dover. It is clear, as Westlake had already pointed out (Int. Law 1913, p. 189), that the old rule has now entirely lost all its meaning. It may well be that one result of the war will be an international convention between all those States which have a coast-line by which the area of jurisdiction and control over territorial water is extended and adapted to the new conditions.

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Lawyers and War.—WHY is it that Great Britain has not exerted her might in the war as vigorously as some of her impatient sons had hoped? Mr. F. S. Oliver, in his new book, 'Ordeal by Battle,' finds the explanation in 'the superfluity of lawyers in the Cabinet.'

Lawyers see too much of life in one way, too little in another, to make them safe guides in practical matters. Their experience is made up of an infinite num-

ber of scraps cut out of other people's lives. They learn and do hardly anything except through intermediaries. . . . The shopkeeper who blunders in his buying or his selling, or the manufacturer who makes things as they should not be made, suffers painful consequences to a certainty. His error pounds him relentlessly on the head. Not so the lawyer. His errors are for the most part visited on others. His own success or non-success is largely a matter of words and pose.

What exactly Mr. Oliver means by saying that a lawyer's 'success or non-success is largely a matter of words and pose,' we are unable to fathom. They can have not the slightest meaning for the members of that branch of the legal profession to which Mr. Lloyd George belongs. Nor, we imagine, will any solicitor read what Mr. Oliver says about the errors of the lawyers beng visited on others without remembering that he is liable, if he commits a mistake, to have an action for negligence brought against him. 'A Government of lawyers,' we are told, 'is likely to be blind to the facts, because it is not accustomed to deal with facts.' Was Mr. Oliver ever in a court of justice? He would know, if he had been, that facts, and not law, are the main theme of argument at the Bar. He would appear to propound the startling theory that men who are, accustomed to deal only with their own concerns are better qualified to guard the interests of the State than are men who are accustomed to handle the affairs of others. Where are these superior persons to be founded? The presence of many lawyers in Parliament does not prevent them from making their genious for government known to the public. Were More, Selden, Somers, Pitt—to name only a few of the lawyers who have defended the liberties of England—blind to facts. The prejudices which Mr. Oliver expresses were once put into pratice. What was the result? The House of Commons from which lawyers were excluded is pilloried in history as the *Parliamentum Indoctum*.—*The Law Journal, June 19, 1915*

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Miscellany.—The office of Lord Chancellor of Ireland, which has been the subject of so much controversy in connection with the formation of the Coalition Government, is (says the *Globe*) one of the best paid judicial posts in the United Kingdom, though three or four years ago the salary was reduced from 8,000*l.* to 6,000*l.* a year. The Lord High Chancellor, whose salary is 10,000*l.* and the Lord Chief Justice, to whom a grateful country pays 8,000*l.* a year, are the only occupants of judicial offices who receive a larger salary. The six Lords of Appeal-in-Ordinary and the Master of the Rolls

receive the same amount as the Lord Chancellor of Ireland. Scotland's chief judicial officer, the Lord President of the Court of Session, is made to realise that he belongs to a thriftier race by receiving 1,000*l.* a year less. The Irish Lord Chancellor is entitled to a pension of 4,000*l.*—a generous allowance to which Lord Campbell, who was Lord Chancellor of Ireland before he became the keeper of his Sovereign's conscience, renounced his right.

LORD CAMPBELL is not the only famous English lawyer who has held the Irish Lord Chancellorship in modern times: Lord St. Leonards is another occupant of the Woolsack who served a kind of apprenticeship in the Emerald Isle. At one time it was customary to appoint a member of the English Bar to preside over the Irish judicial system. Reciprocity, however, was not among the virtues of the English Bar in those days. Mr. Atlay, writing of the appointment of Lord St. Leonards to the Lord Chancellorship of Ireland in 1835, says: 'Yet only a few years previously Plunket had been compelled to surrender the Mastership of the Rolls in England on account of the feeling at the English Bar against a member of the Irish Bar being appointed to an English judicial post.' The office of Lord Chancellor of Ireland was, in truth, usually given to some influential lawyer whose claims to promotion could not otherwise be satisfied. 'The Irish Lord Chancellorship,' wrote Lord Campbell, 'would not by any means be a desirable destiny for me, but it is better than anything else that is open.' That was the spirit in which it was accepted as a rule. No wonder the practice of appointing English lawyers came to an end.—*Law Journal, June 19, 1915.*

CONTEMPORARY LEGAL LITERATURE.

The Harvard Law Review for April opens with appreciative notices of Professor Gray, the author of the well-known book on Perpetuities from Professors Thayer, Willinston and Beale. He preferred Professorship in the University to a judgeship in the Supreme Court and so long as there was strength in him, loved to learn law and lecture law.

Mr. Meclair discusses the extent to which it is permissible under the law to *contract out of liability for negligence*. It appears from the discussion that there is no general con-

currence of views on the part of the courts in a broad proposition that apart from Public Service undertakings an antecedent contractual release from liability for negligence which has no characteristic of wilful or intentional wrong is void; while the Public Service cases only indicate a general concurrence of view that obligations to those who are entitled to such service cannot be reduced by any such stipulation. Mr. Charles G. Haines compares the Canadian constitution with the American constitution with special reference to *judicial review of legislation.* Notwithstanding the dissent of some eminent judges and writers, Mr. Haines thinks with Professor Dicey that there is great resemblance between the United States Constitution and the Canadian, this feature, *viz.*, the principle of judicial review being one of the features borrowed from the former. The careful distribution of all legislative power between the Federal and the Provincial legislatures, unlike the United States constitution the residue of powers being in the Federal legislature and not in the Provincial legislatures the absence of a bill of rights circumscribing legislative power and the power of veto vested in the Federal Government limit the scope for judicial review in Canada.

Mr. Arthur March Brown discusses the views of various Judges in the United States as to *comity*--the word used there for deference to decisions of other courts of Co-ordinate jurisdiction and expresses the hope that notwithstanding the independence of action which some Judges have claimed for themselves, the courts will work out a policy of harmonious action among those jurisdictions in order to evolve a consistent system of national jurisprudence. As the writer says, in yielding to such constraint, the Courts are not belittling themselves, rather do they gain in dignity thereby.

In the American Law Review for May and June, Mr. James W. Earner discusses the rule as to *the transfer of merchant vessels from belligerent to neutral flags.* The old English, American and Austrian rule was that such transfers were good if *bona fide*, *i. e.*, with the intention of passing property completely and the motive namely that it was to elude capture by the enemy was immaterial. The French, Russian and German rule on the other hand was that such transfers were illegal and did not prevent capture as enemy ship. The declaration of London enacted a new rule that such transfer was valid if *bona-fide*, the burden of proving

bona-fides being on the purchaser. It also enacted that a transfer with the object of eluding capture by the enemy was invalid. Applying this rule to the case of the *Dacia*, the writer argues that the transfer being while in a neutral port, it could not be said that it was to elude capture and if the contrary is held, he thinks the consequence would be no transfer could be considered legal. He contends also that France having ratified the *declaration* with certain modifications which do not bear on this question, she is bound by its provisions and cannot go back to the old French rules.

Mr. Charles Sumner Lobingier very cogently argues for the introduction of Roman Law as the initial subject in the law curriculum. According to him, the transition from the subjects of the arts course will be felt least burdensome if the Roman Law is made to lead students to the more technical study of law. The value of Roman law consists not only in its being the source of many of the legal rules extant but also in its being the source of all fundamental juridical conceptions and a veritable mine of legal phraseology and its supplying a model for studying legal development. The writer shows how even the well known presumption in criminal trials in favour of innocence owes its origin to Roman Law. The indebtedness of international law to Roman jurisprudence is well known while the mercantile law and maritime law are largely based on it. If as Sir Henry Maine believes Emphyteusis is the origin of the Feudal System, even the real property law would be indebted to Roman Law. The Marriage law is largely based as Canon law which is but a modified form of Civil law. The protest of Chief Justice Cockburn, notwithstanding as the Judgment of Lord Holt shows, the law of bailment is founded on Roman law. The extent to which the law of guardianship is under obligation to Roman law, it is not easy to determine but there is no denying that it was to some extent at least influenced by it. The other great jurisprudence of the world, *viz.*, the Mahomedan jurisprudence is also an adaptation of the Roman law to Mahomedan conditions.

In the Michigan Law Review for April, Mr. Theodore P. Ton exposes some of the arguments of Dr. Dernburgh that the treaties of guarantee with respect to Belgium and Luxemburgh were never considered as absolutely binding on the contracting

parties by reference to the speeches of Gladstone in 1870—71 on which reliance was placed by the former. What was said by Mr. Gladstone was that though England had the right to interfere in support of Belgium when her neutrality was violated, there was no such absolute duty to intervene irrespective of the circumstances; for instance the condition in which England finds herself. The writer very rightly asks in addition—apart from any treaty, what right had Germany to enter Belgium without her permission. He points out the futlity of the plea of Germany that she had agreed to indemnify Belgium if she gave free passage when it is remembered what guarantee there was in that event of the allies not invinding the Belgium territory.

In the same Review for May, there is an interesting account of religious corporations in America. The two original forms were the territorial parish and the corporation sole. These were developed before the Revolution as part of the religious establishment then in vogue. The territorial parish was a curious kind of corporation; for the debts of the corporation, the property of any member could be seized. There was also no way of excommunicating a member. The corporation sole had this disadvantage *viz.*, there was a period between the death of one officer and the election of the other when the property was in abeyance and the gratest confusion prevailed.

In their place, three new forms have grown up, the corporation aggregate, the trustee corporation and the modern form of corporation sole of these the first fills the needs of churches with a congregational form of Government while the corporation sole serves the necessities of Churches whose form of Government is episcopal *i. e.*, to say the bishops who are elected according to the rules of their curches are permitted to declare themselves to be corporation sole. The trustee corporation presents the ideal means of corporate existence for churches that occupy an intermediate position where certain officers of voluntary associations are declared to be trustees so as to enable them to hold property. In addition to these forms, the Roman Catholic Church is another from.

In another article of interest Mr. Bingham discusses the nature and importance of legal possession.

Mr. Harriette M. Dilla says that there is need for a more careful study of the *sociological aspects of Criminal law.* Taking

the case of mental infirmity, he says that 30 % of the imbeciles become so by causes operating after birth 5% at or about birth, 30% by antenatal causes *i. e.*, to say by heredity, epilepsy, venereal disease, drunkennes or imbecility of parents. He says that careful differentation is necessary among criminals according to the causes, instructibility, age, etc., of the criminals and wherever the criminals are incapable of improvement they must be segregated and must be permanently confined or otherwise prevented from handing down their characteristics. He deplores the in trusion of politics in the selection of Superintendents which is responsible for much of the inefficiency of these institutions.

The causes of the inefficiency of the administration of justice in America are elaborately reviewed in an article in the American Law Review for March, April. The main points in which attention is required according to the writer for its improvement are (*i*) Proper training for the legal profession. He says that in many of the States, there is no preliminary training, or general qualification of any sort insisted upon for those who pursue the profession of law. (*ii*) Giving the bar greater influence in the selection so as to insure expert qualifications in the Judge. As it is, the elective principle has led to the appointing of persons who have no qualifications for the office. (3) Unification of the judicial system. The multiplicity of Courts and their independence of each other make the question of *venue* one scandalous cause of failure of justice. (4) Giving courts power of making rules of procedure (5). Improvement of legislative law making both in substance and technique. (6) Thorough study of the new problems which an industrial and urban society has raised.

As Mr. L. D. Mallonee says though custom has ceased to be a primary source of law in the western countries is still an important element of law— in so far as it affects legislation and forms a large element of the rules that determine daily conduct.

Discussing the maxim *res ipsa loquitur*, Professor Lee of Mc. Gill University says that it is not a rule of law nor even a presumption of law but only rule of commonsense an a inference from common experience. It has no connection with the doctrine of noxal surrender-holding a man liable irrespective of his mental

condition. It applies whenever it is so improbable that the accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that was so caused. (Canadian Law Times for April). In the Canadian Law Times for May, Sir James Aikins pleads for codification of the common law in Canada and he thinks that it is one of the duties of the Bar Association to see it done. Mr. Lafleur pleads for uniformity in laws in Canada, especially in commercial law, law of wills at least with respect to formalities, taxing statutes, and Processual Law.

BOOK REVIEW.

THE LAW OF TRANSFER IN BRITISH INDIA *by Dr. H. S. Gour, Vol. II.*

This is the second volume of Dr. Gour's well-known book on Transfer of Property Act, the first volume of which we have already reviewed. The subject dealt with is mortgages and charges, much about the most difficult portion of the property law in India and the profession is under deep obligation to Dr. Gour. It was a good idea not to have omitted the processual law connected with mortgages which is by no means the least difficult portion of this difficult subject. We do not feel called on to say more with respect to a book like Dr. Gour's which has already made its reputation as an indispensable item of every lawyer's library. This volume fully maintains the excellent features we noticed in the earlier volume.

MODEL PLEADINGS AND DEEDS *by Rai M. C. Sarkar Bahadur.*

We have no doubt that this publication will be found useful by beginners in the profession all over India though the Bengalee pleadings at the end can be appreciated only by the practitioners of that province.

THE INDIAN DECISIONS (OLD SERIES) VOLS. 9 and 10. *Edited by the Lawyer's Companion Office*:

We welcome the re-appearance of this valuable series. These volumes contain Vols. 2 and 5 of the Bengal Sudder Dewany Adalut Reports. In publishing them, the Editors laboured under the disadvantage of having to frame headnotes which are wanting in the Original Reports. Apart from the historical interest that attaches to these reports, they contain much that is valuable precedent even to day, especially on such topics, as customs, land tenure Religious Endowments, and Hindu and Mahomedan Law. Tara Muhnee Dasee's case which was the centre of so much controversy recently is reported in this volume. The profession is thankful to the publishers for bringing these rare publications within the reach of all. Law Printing House publications have acquired such a reputation that we need hardly commend the get up or the finish of these volumes.

THE CURRENT INDEX OF INDIAN CASES, 1914, PUBLISHED *by T. A. Venkasamy Rao and T. S. Krishnasamy Rao.*

We are glad to observe that this volume maintains to the full the reputation that this publication has acquired for fulness and neatness.

ADMINISTRATION OF CRIMINAL JUSTICE IN ANCIENT INDIA *by Mr. A. V. Ramanathan.*

We commend this study of Sukranitisara with reference to the Criminal Procedure obtaining in Ancient India. It is only by careful study of this kind of the ancient legal and—*quasi legal* legal works that reliable information as to Ancient Indian History can be gleaned. This study by the writer has reveaed the high perfection to which Criminal procedure had attained in Ancient India. The writer is not prepared to concede great antiquity to the work, a point on which there is legitimate scope for considerable difference of opinion.